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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

DONALD DAVIDSON,

Plaintiff-Appellant,

-against-

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Donald Davidson, prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, which affirmed a final judgment entered in the United States District Court for the Eastern District of New York on May 18, 1972 by the Honorable Orrin G. Judd, District Judge, which grants summary judgment dismissing the Complaint on the basis of the defense of Statute of Limitations.

There was no opinion of the Court of Appeals reported. The opinion of Judge Orrin G. Judd is set forth in Appendix B hereof.

Jurisdiction.

The final decision of the Court of Appeals, Second Circuit, was entered December 19, 1972.

The jurisdiction of the Court is invoked under 28 U.S. Code 1254 (1).

Questions Presented

[a] Does the Statute of Limitations bar the case of plaintiff railroad employee who turned a defective railroad switch one evening and felt a pulling sensation in his back but did not know that he was injured and finished his shift that day, and it was not until after 12 midnight or the next day that he first found out that the pulling sensation had developed into an injury and suit was commenced within three years after the injury was known or three years and one day after he turned the switch?

[b] Does the District Court have the right to disregard appellant's constitutional right to a jury trial and on summary judgment disregard the sworn contention of appellant and make a finding that appellant sustained his injuries at the time he pulled the switch?

[c] Does the Court of Appeals for the Second Circuit have the right to disregard the applicable decisions of this Court such as *Urie vs. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed.

1282 and *Tiller v. Atlantic Coast Line*, 323 U.S. 574, 655 S.Ct. 621, 89 L. Ed. 465 and hold that under Federal Employers Liability Act, Sec. 6, an action must be commenced three years after the event and not after injury.

[d] Was the Court of Appeals for the Second Circuit correct in failing to agree with the Seventh Circuit *(Suttleworth vs. Crown Can Company,* 165 F.2d 974) and the Fifth Circuit (*R.J. Reynolds Tobacco Company v. Hudson*, 314 F.2d 776) which courts have held that a cause of action does not accrue until there is an injury?

[e] Was the Court of Appeals for the Second Circuit correct in holding that on summary judgment it can disregard the constitutional right to a jury and make its own findings of fact upon the disputed evidence found in affidavits presented to it.

Statement of Facts.

The complaint states that the defendant railroad was engaged in interstate commerce (11a, 12a) and in the operation of its railroad operated and controlled a certain railroad yard (12a, 13a). That plaintiff was employed as a brakeman or switchman and was acting in the scope of his employment for defendant (13a). That on November 1, 1968, he threw or attempted to throw a switch and he was caused to sustain injuries. That the cause of action was governed subject to and controlled "by the Federal Employers Liability Act" (14a). The complaint then went on to allege (without stating any dates) that the condition of the switch caused the injury (15a). Also without stating any dates the complaint continued that by reason of the foregoing plaintiff was caused to suffer and sustain personal injuries, etc. (16a).

Defendant moved to dismiss upon the ground that the complaint was filed on November 2, 1971, and claimed that the last day to commence the suit was November 1, 1971, pursuant to Title 45 U.S.C.A., Section 56, which provides for suit to be commenced "three years from the day the cause of action accrued" (24a).

The affidavit in opposition alleged that plaintiff experienced difficulty in operating the switch and noticed a pulling sensation in the area of his lower back (31a). Nevertheless, he remained at his work and continued his tour of duty that day which ended at 11:00 P.M. That before he left his place of employment he reported the incident so his superiors should be aware of the defect of the switch and he mentioned the pulling sensation in his lower back, although he did not experience any pain (31a, 32a). That it was not until after midnight and during the early morning hours of November 2, 1968, that he was beginning to experience pain in his lower

back. His fellow employee then drove him to the Good Samaritan Hospital and there was a diagnosis of injury to lower back (32a, 33a).

Summary judgment was granted below by Judge Judd (5a-8a).

POINT I.

The cause of action did not accrue until there was an apparent injury which in this case was on November 2nd, 1968; therefore the court erred when it held that plaintiff was one day late when he commenced his cause of action.

This court is respectfully referred to the opinion of Judge Kerner of the Circuit Court of Appeals, Seventh Circuit, in the case of *Suttleworth vs. Crown Can Company,* 165 F. 2d 974, wherein the following language appears:

> "• • • To state the principle in other language in every case involving actionable negligence, there must exist three essential elements; first, the existence of a duty on part of the person charged to protect the complaining party from the injury received; second, a failure to perform that duty; and third, an injury resulting from such failure. When these elements concur, they unitedly constitute actionable negligence and the absence of any of these elements renders the evidence insufficient. *Muncie Pulp Company vs. Davis,* 162 Ind. 558, 70 N. E. 875."

The third essential element referred to by Judge Kerner, injury, did not manifest itself to the plaintiff until the early morning hours of November 2, 1968, and

in such a manner as to make him realize that the incident that occurred on November 1, 1968, was the competent producing cause of the symptoms he experienced on November 2, 1968.

In plain simple words there was no action in existence on November 1, 1968, because up to the end of that day there was *no* injury. If this injury did not develop the next day there never would have been a lawsuit pursuant to the *Suttleworth* case.

The within is not a case of sudden contact causing immediate injury. The action arises under the Employers Liability Act in that it is claimed that the equipment used by the railroad men became defective and the use of a defective switch by the plaintiff railroad worker on one day ultimately resulted in personal injuries on the next day.

The question involved has come up many times. We find it in breach of warranty cases, sickness as a result of the work, etc. The case herein is a classic example. The switch that caused the accident could have been in the same condition for a long period of time. Each time it was used in theory a cause of action would arise if injury resulted. However, until there was injury there was no case and hence no wrong. The best definition of same we find in the case of *Prosch vs. Yale*, 307 F. Supp. 524, where the opinion of Talbot Smith, D. J., in discussing the Statute of Limitations in a product liability case stated:

> "In the welter of minutiae we turn principally to Cooley and Cardozo for analysis. The key word before us is the word 'wrong' • • • a less fortunate choice of word for triggering the running of the cause of action could barely have been

made. Cooley addresses himself to the word in these terms:

"'Concurrence of Wrong and Damage. It is said by the authorities that it is the conjunction of damage and wrong that creates a tort, and there is no tort if either damage or wrong is wanting. Here the word "wrong" is used in the sense of a thing amiss; something which for any reason the party ought not to do or to permit, and which does not become the actionable wrong called a tort unless the other element is found in the same case, namely, a damage suffered in consequence of the thing amiss. In this sense we shall frequently be compelled to make use of the word "wrong," although it may sometimes be confusing to do so. This is one of the inconveniences which follow from employing a word which signifies a quality to designate a class of cases in which, in its ordinary sense, it is only an element, while it is equally applicable to numerous other cases which are not so classed.'

"The distinguished jurist then goes on to discuss those tortious acts with respect to which 'damage (is) merely implied or presumed: not damage shown,' together with a discussion of the need for the presumption of damage in such cases, concluding with those cases ('a very large proportion') where 'the wrong is only complete when damage is suffered.'"

The Supreme Court surely had this theory in mind hen we find that in the case of *Tiller vs. Atlantic Coast ine*, 323 U. S. 574, 655 S. Ct. 621, 89 L. Ed. 465, the inion of Mr. Justice Black on page 580 of the United tates Report states the following:

"• • • Federal Employers Liability Act, Sec. 6 provides that a suit under that act must be commenced within three years after injury • • •."

The reasoning of the Supreme Court can best be inferred from the opinion in the case of *Urie vs. Thompson*, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282. In the *Urie* case the action was to recover for silicosis which was the result of the inhalation of sand used on the engine. The action was brought under the Boiler Inspection Act. The Supreme Court interpreted the Boil Inspection Act to cover silicosis. However, the railroad urged that the action was barred by the Statute of Limitations on the theory that each time plaintiff inhaled silica dust a separate tort occurred and each inhalation of silica gave rise to a fresh cause of action. However, the Supreme Court held in favor of *Urie* and the opinion on page 170 of the United States report contained the following:

> "• • • the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves • • •."

The decision of the Fifth Circuit in the famous case of *R. J. Reynolds Tobacco Company vs. Hudson*, 314 F. 2d 776 (1963), contains numerous passages that are very helpful to the within appeal. Said opinion on page 782 contained the following:

> "• • • In *Guderian v. Sterling Sugar & Ry. Co.*, 1922, 151 La. 59, 91 So. 546, involving a claim under the Employers' Liability Act, the Louisiana Supreme Court held squarely that the exception recognizing prescription as starting with knowledge of damage applies in a personal injury action. The court said:
>
> "'A person cannot bring suit until his cause of action has accrued, and until a cause of action has accrued, prescription cannot run against it. *Jones v. T. & P. R. R. Co.*, 125 La. 542, 51 South. 582, 136 Am. St. Rep. 339.'
>
> • • •

"In that case, as in the case at bar, the cause of action ripened with time * * *. The blow caused a gash which required some slight medical attention but gave the plaintiff no concern and did not cause him to lose a day's work. Early in April he observed spots before his eyes. April 23 he noticed that his evesight was failing. The evidence showed that the blow over the left eye caused the retina to be detached in the right eye. In May he lost his left eye and became totally blind. He filed suit April 22, 1920. The defendant contended that prescription began to run from the time the blow was struck; the plaintiff contended that it commenced at the time he lost his eye. The Court held:

" 'Undoubtedly, the blow injured the optic nerve at the time it was given, but plaintiff did not know that, and had no means of ascertaining it. His eyesight was not percentibly affected. He continued his work, stopping only long enough to have the wound on the forehead dressed. He had no cause of action at that time under the Employers' Liability Act. His cause of action was in process of development, but without knowledge of this fact on his part, or means of knowledge. The first symptom that arose suggesting the possibility that his eye was injured was not sufficient to excite the slightest alarm in his physician, whose opinion dissipated plaintiff's fears. He had no knowledge of even what might happen until April 23, 1919, which was within one year prior to this suit, unless the symptom, above mentioned be deemed knowledge, but we think it should not.

" 'Plaintiff's cause of action did not arise until he lost his eye. It is self-evident that one cannot sue until his cause of action arises.' *Guderian vs. Sterlina Sugar & Ry. Co.*, 1922, 151 La. 59, 91 So. 546, 547."

The opinion continued on page 784:

"The closest non-Louisiana case in point is *Mitchell v. American Tobacco*, D. C., M. D. Pa., 1960, 183 F. Supp. 406. In that case the complaint alleged that Mitchell died, February 1958, as a result of lung cancer allegedly caused by smoking. He smoked two packages of cigarettes a day for many years. The defendant pleaded the Pennsylvania Statute of Limitations of two years. The Court quoted approvingly from *Ayers v. Morgan*, 1959, 397 Pa. 282, 154, A. 2d 788, 792:

"'Both the defendant and the lower Court have apparently misevaluated the specific wording of the Act of June 24, 1895. It seems they regard the crucial words as reading: "Every suit • • • must be brought within two years from the time *the act was committed.*" The statute, however, says that the suit must be "brought within two years from the time *when the injury was done.*" The injury is done when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable.'

"And held:

"'That, it seems to me, is the only sound, logical and humane conclusion that can be reached in this case, and it seems to be the trend both in Federal and State courts. To paraphrase the court in Ayers, whether plaintiff's averment that the lung cancer did not become apparent until it was discovered at a time well within the two year period can be supported by evidence, only the trial itself can determine, but the plaintiff is certainly entitled by law to have the opportunity to present his evidence, and by the same token defendant would then be entitled to introduce evidence as to any negligence on the part of plaintiff's decedent.'

"The holding in Mitchell is in line with *Urie v. Thompson*, 1949, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, an action under the Federal Employers' Liability Act, 45 U.S.C.A. §51 *et seq.* In *Urie* the Court held that an employee who had silicosis was 'injured' when the 'accumulated effects of the deleterious substance manifest themselves': that, on the record, there was 'no suggestion that Urie should have known he had silicosis' prior to the diagnosis of the disease. The legislation would afford Urie 'only a delusive remedy', if the remedy were barred because 'at some past moment in time, unknown and inherently unknowable even in retrospect. Urie was charged with knowledge at the slow and tragic disintegration of his lungs.' See also *Quinton v. United States*, 5 Cir., 1962, 304 F. 2d 234, another FELA case. That was a tort action for malpractice. The plaintiff's pregnant wife was given three transfusions of RH positive blood, when her correct blood type was RH negative. Judge Tuttle, for this Court, ruled: '[B]y far the most sensible and just rule * * * is that a claim for malpractice accrues against the Government when the claimant discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice.' And see *United States v. Reid*, 5 Cir., 1958, 251 F. 2d 691; *Kozan v. Comstock*, 5 Cir., 270 F. 2d 839."

Here as stated above the "pulling sensation" did not disable plaintiff. He finished his tour of duty. He took the necessary precaution of reporting the incident to protect the next trainman that would use the switch and to protect himself in the event the incident developed into an injury. If it did not develop he would have been very happy not to have a cause of action against the Company. However, after midnight the cause of action "accrued," but it was then that he began to suffer pain and eventually the injury developed. May we once more refer to paragraphs in the opinion in the case

of *R. J. Reynolds Tobacco Company vs. Hudson* to illustrate to this court that the within was not a proper cause for summary judgment (pp. 7 & 8):

"Summary Judgment

"[13] The 'mission of the summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' Salutary as this procedural device of summary judgment is, it has had a checkered career in this circuit. A recent study notes that of more than 150 cases in the Fifth Circuit of summary judgment, about one-half have resulted in reversals. Pyle, Appraisal of Summary Judgment Practice, 31 Miss. L. Jour. 147 (1961)."

• • •

"[14] This interlocutory appeal deals only with prescription; we are not concerned with the merits of the case. Here, the plea of prescription raises legal issues the applicability of which depend on the facts. Only by developing the facts in a trial of the case can it be determined whether there is truly no genuine issue as to any material fact entitling the defendant to a judgment as a matter of law on its plea of prescription. In reaching this conclusion, we do not mean to say and we do not imply that on the state of the record before us the plaintiff's proof warrants submission of the case to the jury on the factual issues forming the basis for his opposition to the plea of prescription."

We need not repeat the above to inform this court that only a jury should decide on the sworn testimony and evidence developed during a trial whether the cause of action accrued on November 1st or 2nd, 1968.

Reasons for Granting the Writ

The holdings in this case below not only disregard the applicable decisions of this Court but in addition it points out a variance between the different circuits and finally charges the law of summary judgment allows the court to disregard a plaintiff's constitutional right to a jury and allows a court hearing a summary judgment motion to decide disputed questions of fact.

WHEREFORE, petitioner prays that a Writ of Certiorari should be granted and this Court reverse the Court below and reinstate the complaint of plaintiff.

Respectfully submitted,

Harold Warren
Attorney for Petitioner

Leonard Bernstein
Bernard Meyerson
On the Petition

APPENDIX A

United States Court of Appeals for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of December one thousand nine hundred and seventy-two.

Present: HON. LEONARD P. MOORE, HON. WILLIAM H. MULLIGAN, HON. WILLIAM H. TIMBERS, Circuit Judges,

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Donald Davidson,

Plaintiff-Appellant,

v.

The Long Island Railroad Company,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of

New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

APPENDIX B

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

DONALD DAVIDSON,

Plaintiff,

-against-

THE LONG ISLAND RAILROAD COMPANY,

Defendant.

Appearances:

LEONARD BERNSTEIN, ESQ.
Attorney for Plaintiff

GEORGE M. ONKEN, ESQ.
Attorney for Defendant

By: ANGELO GRANATELLI, ESQ.
of Counsel

JUDD, J.

Defendant has moved for summary judgment dismissing the complaint on the basis of the defense of statute of limitations pleaded in its answer and supported by affidavit.

Although the complaint fails to set forth the statutory basis for this court's jurisdiction, as required by F.R.Civ.P. S(a), it appears to be founded on the Federal Employers Liability Act, 45 U.S.C. §51 *et sec.*, since it is brought by a railroad employee against his employer on the basis of alleged negligence.

The complaint in the action was filed on November 2, 1971. The complaint recites that plaintiff was in the act of operating a switch on or about November 1, 1968 "and in course of his employment, he was caused to sustain serious and severe personal injuries." paragraph Fifteenth. The accident report, presented at 8:30 p.m. on November 1, 1968 and that plaintiff described the "Nature of Injury" as "lower back pains" and the cause as "switch difficult to throw." The opposing papers recite that plaintiff reported the incident to his superiors as a means of notifying them that the switch was defective "and also to take into account the possibility that this incident may develop into an injury manifesting itself sometime after the occurrence of this particular incident." Plaintiff remained at the yard until the completion of his shift, was taken home by a fellow employee, and then was examined as an emergency patient in Good Samaritan Hospital in the early morning hours of November 2, 1968 and sent home with a diagnosis of "pulled muscle."

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

A cause of action accrues at the time of the injury. *Rodzek v. N. Y. Central R. R. Co.*, 169 F. Supp. 803, 805 (E.D. Mich. 1959). In connection with an injury on a railroad, the cause of

action accrues on the date of the accident, and not at a later time when the plaintiff learns the full extent of his injuries. *Deer v. N. Y. Central R. Co.*, 202 F. 2d 625 (7th Cir. 1953); *Brassard v. Boston & Maine Railroad*, 240 F. 2d 138 (1st Cir. 1957).

There is nothing to the contrary in *Shuttleworth v. Crown Can Co.*, 165 F.2d 974 (7th Cir. 1948), which plaintiff cites. That case, affirming a judgment for defendant, stated that injury was part of the requirement of a cause of action for negligence, but it did not say that the cause of action accrues when the injured party arrives at the hospital rather than when the accident occurs.

Injury arising from a specific incident is not like a products liability case, *Prosch v. Yale and Towne Inc.*, 306 F. Supp. 524 (E.D. Mich. 1969), where the injury occurs after the product has left the defendant's hands, or a silicosis case, *Urie v. Thompson*, 337 U.S. 163, 170, 69 S. Ct. 1018, 1025 (1949), where "no specific date of contact with the substance can be charged with being the date of injury." The date of injury here was the date when plaintiff found it difficult to throw the switch and reported that he had been injured and was suffering "lower back pains."

Where it is clear that a plaintiff has waited beyond the allowed period of three years before filing action, it is unnecessary to go through a trial, and the case should be dismissed.

It is ORDERED that defendant's motion for summary judgment be granted, and that the Clerk enter judgment for defendant dismissing the complaint.

s/ ORRIN G. JUDD
U.S.D.J.